EMERGENCY REGULATION 39-21-112.3.5

1. Definition of “Retailer that does not collect Colorado sales tax” – A retailer that does not collect Colorado sales tax is a retailer that sells taxable property or services to customers who are not exempt from sales tax but does not collect Colorado sales or use tax. Such retailers are also referred to in this regulation as “non-collecting retailers”.

2. Definition of “Colorado purchaser”

    a. With respect to sales of goods that are shipped to the purchaser, a Colorado purchaser is a purchaser that requests the goods be shipped to Colorado.

    b. With respect to sales of goods that are downloaded or otherwise delivered electronically

        i. If the purchaser provides a “bill to” address, then a Colorado purchaser is a purchaser whose “bill to” address is in Colorado;

        ii. If the purchaser does not provide a “bill to” address, then the non-collecting retailer shall make a determination of Colorado purchaser using any other reasonable method.

3. Obligation to give notice with each purchase – §39-21-112(3.5)(c) C.R.S.

    a. A non-collecting retailer must give notice with respect to all Colorado destination sales that Colorado tax is due on all non-exempt purchases. This notice must appear on each invoice or, if no invoice is normally provided, must be given to the purchaser as part of the sale, either immediately before or immediately after the sale. If the non-collecting retailer does not provide an invoice and does not have a reasonable means of providing the notice either immediately before or immediately after the sale, the notice shall be considered sufficient if the non-collecting retailer sends a confirmation e-mail containing the notice.

    b. The notice shall contain the following information:

        i. The non-collecting retailer is not obligated, and does not, collect Colorado sales tax;

        ii. The purchase is subject to Colorado sales tax unless it is specifically exempt from taxation;

        iii. The purchase is not exempt merely because it is made over the Internet or by other remote means;

        iv. The State of Colorado requires that the taxpayer file a sales/use tax return at the end of the year reporting all of the purchases that were not taxed and pay tax on those purchases;

        v. Retailers that do not collect Colorado sales tax are obligated to provide purchasers an end-of-year summary of purchases in order to assist purchasers in filing their tax report;

        vi. Details of how to file this return may be found at the Colorado Department of Revenue’s website, www.taxcolorado.com;

vii. Retailers that do not collect Colorado sales tax are required by law to provide the Colorado Department of Revenue with a report of the total amount of all of a purchaser's purchases at the end of the year.

c. The above referenced notice must be clearly legible and reasonably prominent on the invoice. The notice in (a) must be accompanied by a notice in bold typeface in a font size used by the retailer for other text on the invoice appearing immediately adjacent to the dollar total of the transaction referencing the notice in (a) and reading as follows: "Please see important sales tax information".

d. If the taxpayer is required to provide a similar notice for another state in addition to Colorado, and the retailer provides a single such notice to all purchasers with respect to items purchased for delivery into all states, the notice required in (a) shall be sufficient if it contains substantially the information required in a form that is generalized to any state.

e. De minimis non-collecting retailer – any non-collecting retailer that made total gross sales in the prior year of less than $100,000 and reasonably expects sales in the current year will be less than $100,000 shall be exempt from the notice requirement in (3)(a).

f. Penalties

i. The non-collecting retailer shall pay a penalty of $5 for each invoice documenting a sale to a Colorado purchaser on which the required notice does not appear.

ii. Waiver of penalties due to implementation time frame and notice – Because of the brief time period between enactment of the governing statute and required implementation, if a non-collecting retailer begins to provide the required notices or begins to collect Colorado sales tax prior to May 1, 2010, any penalties that would otherwise be due for invoices issued between March 1, 2010 and April 30, 2010 shall be waived. However, no such waiver shall automatically apply if the non-collecting retailer does not begin to issue the required notices or begin to collect Colorado sales tax prior to May 1, 2010.

4. Obligation to give Colorado purchasers notice of total purchases made - §39 21 112(3.5)(d)(I) C.R.S.

Because non-collecting retailers will not be required to provide this notice until 2011, this paragraph is reserved for permanent rulemaking.

5. Obligation to give the Colorado Department of Revenue notice of purchases made by Colorado purchasers - §39 21 112(3.5)(d)(II) C.R.S.

Because non-collecting retailers will not be required to provide this notice until 2011, this paragraph is reserved for permanent rulemaking.

APPORTIONMENT OF COLORADO SALES AND USE TAX ON COMPUTER SOFTWARE

EMERGENCY REGULATION 39-26-102.13

1) De Minimis rule

   a) Standardized software does not include software that is designed or developed to the specifications of a specific purchaser. Software designed and developed to the specifications of a specific purchaser shall not be considered standardized software simply because it includes de minimis standardized software as part of its code.

   b) De minimis standardized software includes:

      i) The base language used to write the software

      ii) Prewritten subroutines whose commercial value is negligible

      iii) Prewritten subroutines the purposes of which are purely incidental to the purpose of the software developed for the specific user.

   c) Standardized software is not de minimis if:

      i) its purpose is to principally fulfill one or more specifications of the purchaser

      ii) except with respect to the language software is to be written in, it is identified prior to the purchase in any way as being part of the software

      iii) its value exceeds 25% of the value of the software designed or developed to the specifications of a specific purchaser.

   d) If a developer purchases standardized software for inclusion in software designed or developed for a specific user and such software is de minimis, the developer shall pay sales tax on the purchase of such standardized software.

2) Maintenance agreements

   a) Standardized software does not include maintenance agreements for the maintenance of standardized software. However, if the price of the maintenance agreement includes the price of standardized software, then the rule of (13.5)(a)(II)(B) applies and the maintenance agreement must contain a reasonable, separately stated charge for the standardized software.

   b) De minimis rule with respect to maintenance agreements – If the value of the standardized software included with the maintenance agreement is less than 25% of the price of the maintenance agreement, then the maintenance agreement shall not be considered to include standardized software.

3) Apportionment of Use Tax for Multiple Points of Use. Colorado sales and use tax is levied on standardized computer software that is concurrently available for use in multiple jurisdictions without regard to the jurisdiction where the purchaser takes delivery or the location or ownership of any server on which the software is installed. Such software is referred herein as Multiple Point of Use (MPU) software. Colorado sales or use tax that is applicable to MPU software shall be apportioned pursuant to the following:

a) A purchaser, who knows at the time of its purchase of taxable computer software that the software will be MPU software should present to the seller a Multiple Points of Use Exemption Certificate and apportion the applicable tax. If the purchaser pays to the seller the unapportioned tax, the purchaser may submit to the department a claim for refund (Form DR 0137) for that portion of the tax collected by the seller that should be apportioned to jurisdictions other than those administered by the Department.

b) Upon receipt of a MPU certificate, the retailer is relieved of all obligations to collect, pay, or remit the applicable tax and the purchaser shall be obligated to pay and remit the applicable tax and submit a copy of the MPU certificate to the Colorado Department of Revenue, Field Audit Section, 400 S. Colorado Blvd, Denver, Colorado.

c) A purchaser may use any reasonable, but consistent and uniform, method of apportionment that is supported by the purchaser's business records as they exist at the time of the consummation of the sale; except, an apportionment methodology based on the number or employees or users shall be based on the permanent location of those employees or users. An apportionment based on the number of licenses used in this state may be acceptable, even though one or more license is used by a temporary employee.

d) The apportionment methodology shall be based on a fair apportionment of the total purchase price paid by the purchaser. For example, an out-of-state purchaser buys taxable software from seller for a base price of $50,000 (which includes one license) and $20,000 for four additional licenses. One of the licenses is used in Colorado and the other four licenses are used in another state. The Colorado user pays Colorado tax based on the price for the license used in Colorado, including an apportionment of the bundled base price: $70,000/5 = $14,000. The purchaser may not assign the price of the first license to any single user and the price of the remaining licenses to other users. A reasonable method must reflect the location of use of the software by the purchaser and not the location of the services where the software is installed. An MPU certificate may not be used for computer software received in person by the business purchaser at a business location of the seller for software that is loaded on computer hardware prior to sale. Examples of situations where use of an MPU is appropriate include, but are not limited to the following:

   Example 1: Software is installed on a server located in another state but is concurrently available for use by purchaser's employees in Colorado as well as other states. The purchaser gives the seller a copy of its MPU certificate. Part of the sales price of the software will be apportioned to Colorado for sales/use tax purposes.

   Example 2: Software is installed on a server located in Colorado but concurrently available for use by purchaser's employees in other states as well as Colorado. The purchaser gives the seller a copy of its MPU certificate. Part of the sales price will be apportioned to those other states for sales/use tax purposes.

   Example 3: A business in Colorado purchases an enterprise license that allows the purchaser to make copies of software (either from a master disk or downloaded copy) and those copies will be concurrently available for use at the purchaser's business locations in various jurisdictions. Part of the sales price of the enterprise license will be apportioned to Colorado for sales/use tax purposes.

e) A MPU Certificate must be filed for each purchase of taxable software whose tax is subject to apportionment.

EMERGENCY REGULATION 39-26-102.21

1. Sales of Energy

a. Effective Dates

i. *Energy sale or use prior to March 1, 2010 and after June 30, 2012.* The sale, use, storage, or consumption of electricity, coal, gas, fuel oil, steam, nuclear fuel, and coke occurring before March 1, 2010 or after June 30, 2012 are exempt from sales and use tax when used for any of the following purposes: processing, manufacturing, mining (including oil and gas exploration and production), refining, irrigation, construction, telegraph, telephone and radio communication, street and railroad transportation services, and all industrial uses. See, Special regulation 19 "Gas and Electric Services" for acceptable methods of determining the credit allowed for gas and electricity used in restaurant operations.

ii. *Energy sale and use between March 1, 2010 and June 30, 2012.* The exemption from state sales and use tax set forth in subsection 1(a)(i), above, is suspended for such sale, use, storage, or consumption occurring on or after March 1, 2010 and before July 1, 2012, and sales and use tax are due thereon, unless otherwise exempt pursuant to other statutes (e.g., sale to, or use of energy by, charitable entities, schools, and governmental entities). An energy utility whose billing cycle includes exempt sales before and taxable sales after March 1 shall prorate the tax for such periods.

1. *Exceptions.* The suspension of the tax exemption described in subsection 1(a)(ii), above, shall not apply to purchases of:

A. Diesel fuel for off-road use,

B. Electricity, coal, gas, fuel oil, steam, coke, nuclear fuel used for agriculture (e.g., electricity for stock well pumps, electric fences for livestock enclosure, electric fans for drying grain in grain bins, electricity for potato storage building), or

C. Coal, gas, fuel oil, steam, coke, nuclear fuel used for generation of electricity.

2. *State-administered cities, counties, and special districts.* Energy sales described in subsection 102(21) made on or after March 1, 2010 remain exempt from state-administered city, county, and special district sales and use taxes.

b. Definitions

i. "Gas" means natural or manufactured gas used in the production of energy or used in industry to heat greenhouses, used by industrial plants engaged in manufacturing or used for melting metal in foundries, for firing brick kilns, or for other industrial uses.

ii. "Industrial uses" means the use of electricity, coal, gas, fuel oil, coke, or nuclear fuel in a continuing business activity of manufacturing or producing tangible personal property or services as set forth in C.R.S. 39-26-104(1)(c), (d), (d.1) and (d.2).

c. *Energy sale and use for residential use.* The sale, use, storage, or consumption of electricity, coal, wood, gas, fuel oil, or coke sold for residential use is exempt from tax regardless of whether such sale, use, storage, or consumption occurs before or after March 1, 2010. See, regulation 39-26-715.1(a)(II) for additional details.

2. *Newspaper publishers and commercial printers.* Vendors must collect the tax on all sales of equipment and materials to publishers of newspapers and commercial printers, except on sales of newsprint and printer's ink, which are expressly exempt as wholesale sales. "Newsprint" is defined as cheap, machine-finished paper, chiefly from wood pulp, and used mostly for newspapers.

REGULATION 39- 26-102.3

1. "Doing business in this state" under C.R.S. 39-26-102(3)(a) requires that the person both (1) sell, lease, or deliver tangible personal property in this state, and (2) maintain, directly or indirectly, an office, salesroom, warehouse, or similar place of business within the state. A person meeting these requirements must obtain a Colorado Sales Tax License. "Doing business in this state" under C.R.S. 39-26-102(3)(b) requires that the person both (1) sell, lease, or deliver tangible personal property in this state, and (2) regularly or systematically make solicitations in this state. A person meeting these requirements should obtain a Colorado Retailer's Use Tax License or a Colorado Sales Tax License.

2. The solicitation required by (3)(b)(I) of section 39-26-102 C.R.S. may be by any means whatsoever, including advertising by catalogues, newspapers, radio, television, e-mail, or Internet. The solicitation need not originate in this state. It is sufficient that the vendor purposefully direct the advertising into the state, which includes national or international advertising that includes Colorado.

3.

   a. Any retailer that does not collect Colorado tax (the “remote retailer”) and is a component member of a controlled group of corporations, which controlled group also contains a retailer with a physical presence in this state (the “in-state retailer”), is presumed to be doing business in the state at a level sufficient to require the collection of Colorado sales tax. The remote retailer is required to register with the department and is required to collect Colorado sales tax.

   b. The presumption articulated in (a) may be rebutted by the remote retailer by a showing that the in-state retailer did not engage in any constitutionally sufficient solicitation on behalf of the remote retailer.

   c. A retailer that does not collect Colorado tax is a retailer that sells taxable property or services to customers who are not exempt from sales tax, but does not collect sales or use tax.

   d. In-state retailer includes any member of the controlled group of corporations that has a controlling interest in any in-state retailer regardless of the form of doing business of the in-state retailer.

EMERGENCY REGULATION 39- 26-115

EMERGENCY REGULATION 39- 26-116.5

EMERGENCY REGULATION 39- 26-118.2

EMERGENCY REGULATION 39- 26-207

The department waives, subject to the limitations below, penalties and penalty interest set forth in §§39-26-115, 116.5 (except when such tax is actually collected by the retailer), 118(2)(a), and 207, C.R.S. on a non-payment of a sales or use tax liability owed by a retailer or consumer and that arises as a result of statutory amendments enacted by House Bills 10-1190, 1192, 1193, 1194, and 1195 if the sale, use, storage, or consumption giving rise to such tax liability occurred on or after March 1, 2010 and before June 1, 2010. Penalty interest for non-payment of such tax is hereby waived for a period of the first three months following the date on which payment for such tax was first due to the department by the retailer (in the case of retailer's use tax) or, in the case of a consumer's use tax or a direct pay permit holder, by the purchaser or consumer. Penalty interest accruing thereafter on such tax liability is not waived by this emergency regulation. Penalties resulting from fraudulent non-payment or fraudulent late payment are not waived by this regulation. The waivers set forth herein are in addition to penalties and interest waived in House Bill 10-1194 concerning articles and containers sold in connection with sales of food.

a. *Example No. 1.* Out-of-state retailer sells coal to a manufacturer from January 1, 2010 to July 1, 2010. Such sales prior to March 1 are exempt from sales tax. House Bill 10-1190 eliminates the exemption for such sales beginning March 1, 2010. Retailer bills its consumers in April for March sales. Consumers pay the retailer's invoice in May. Tax collected by retailer in May for March sales is due to the department June 20, 2010. Penalty interest that otherwise accrues for nonpayment of such tax beginning June 21 through September 20, 2010 is waived. Any such unpaid tax that remains unpaid as of September 22, 2010 begins accruing penalty interest. Similarly, penalty interest that would otherwise accrue beginning August 21, 2010 for May sales collected by the retailer in July and due to the department on August 20, 2010 are waived for three months following August 21.

b. *Example No. 2.* In May 2010, retailer, who is required to file monthly sales tax returns, sells candy and soft drinks that were previously exempt as food for domestic home consumption but, as a result of House Bill 10-1191, are now subject to tax for sales on or after May 1, 2010. Retailer underestimates the sales tax due on its May sales as reported on its sales tax return filed on June 20, 2010 This regulation does not govern the waiver of penalty for such sales because it is not one of the House bills listed in section 1, above. House Bill 10-1191 sets forth conditions for waiver of interest (waiver of interest and penalty that are otherwise due or nonpayment of tax if the nonpayment is a result of an error made in connection with the elimination of the exemption for candy and soft drinks).

EMERGENCY REGULATION 39-26-707.1

1. Nonessential articles or containers furnished in connection with sale of taxable food. On or after March 1, 2010, a retailer of food, meals, or beverages (referred to as "retailer") who purchases nonessential tangible personal property ("article") or nonessential containers or bags ("container") and furnishes the article or container to a consumer or user (collectively referred to as the "consumer") in connection with the a taxable retail sale of food, meals, or beverages ("food"), must pay sales or use tax on the purchase of the nonessential article or container.

    a. Nonessential articles and containers. An article or container is nonessential if it is primarily used for the convenience of the consumer and is not necessary to transfer the food to the consumer.

        i. Examples of nonessential articles or containers include, but are not limited to, non-reusable:

            - utensils
            - skewers
            - napkins and towelettes
            - bibs
            - serving trays, platters, and dome lid covers to plates or platters
            - placemats, tray liners, and tablecloths
            - sacks
            - grocery bags
            - bags for grocery bulk produce or bread
            - bag ties
            - carryout containers for leftover food sold for immediate consumption
            - straws
            - toothpicks
            - stirring sticks
            - cup lids and cup sleeves
            - portion dividers
            - single-use baking dishes
            - film wrap, plastic wraps, wax paper, foils, butcher paper

        ii. Examples of essential articles or containers include, but are not limited to, non-reusable:

- Plates, cups, or bowls on, or in which, unwrapped or unpackaged hot or prepared food are served to the consumer;

- Cups used in vending machines dispensing beverages;

- Disposable containers or packaging material on, or in which, food is transferred to the consumer (e.g., pizza delivery box), including baskets, boxes, sleeves for French fries, buckets or other containers if the retailer cannot transfer the food to the consumer without such article or container. However, carryout containers used to by a consumer to carry leftover meals from the restaurant are not essential.

2. Articles or Containers not furnished to consumer. A retailer is liable for sales or use tax for its purchase, use, storage, or consumption of an article or container, regardless of whether it is essential to the consumer, if the article or container is not transferred to the consumer. An article or container is treated as transferred to the consumer if the retailer makes the article or container available to consumers on the retailer's premises.

   a. Examples of non-transferred articles include, but are not limited to:

      i. Reusable articles such as glassware, ceramic plates, and silverware;

      ii. Non-reusable articles the retailer uses to cook or store food, such as plastic storage wrap for storage, aluminum foil used primarily for cooking, food labels, and cooking tray liners.

GAS AND ELECTRIC SERVICES

EMERGENCY RULE SR-19

1. Energy Sales occurring before March 1, 2010 or after June 30, 2012.

Gas and electric services, whether furnished by municipal, public, or private corporations or enterprises, are taxable when furnished for commercial consumption, but are not taxable when sold for resale or for any of the uses set out in C.R.S. 39-26-102(21), or when subject to any of the general exemptions of the Act. (Also see Regulation 26-102.21.)

The tax applies to all amounts paid for taxable gas or electric services, irrespective of whether there is an actual consumption; the tax is imposed on all payments, whether in the form of a minimum charge, a flat rate, or otherwise.

Persons performing services, as well as stores, office buildings and other commercial users, are not industrial users and are required to pay the sales tax.

Electricity sold for commercial lighting purposes is taxable, but electricity sold for industrial use is exempt. Example: electricity used to light a restaurant is taxable; electricity used by a restaurant to prepare meals is exempt; electricity used to light chicken houses to stimulate egg production is exempt; electricity used to light an industrial plant to enable it to produce is exempt.

The following methods are available for restaurant operators to claim credit for sales tax on their purchases of gas and electricity used in processing food for immediate human consumption.

[The following sentence added, 2002] These credits or reductions only apply if a Colorado sales tax is charged against all the utility bills of the establishment or their landlord, and the utilities are used to process food that when sold is subject to Colorado sales tax.

(1) If the sales of processed foods exceed 25% of the total sales revenue, the restaurant may receive credit based on 55% of the Colorado sales tax paid on their purchase of gas and electricity.

(2) If the sales of processed food are 25% or less of total sales revenue, or the restaurant is metered for gas and electricity purposes as part of another business operation, such as hotel, motel, bowling alley, gas station, etc., then the allowable credit shall be based on 1/2 of 1% of the total Colorado processed food sales by the restaurant.

For the purpose of determining the applicable percentage of food sales, the term "food sales" shall include only sales of edible foodstuffs which are processed and sold for immediate consumption, but shall not include the sales of alcoholic beverages. The second method may be used even though the applicable percentage of food sales exceed 25%.

The credit shall be claimed on an annual basis on the January sales tax return for the previous year. In the case of a seasonal business, the credit shall be claimed on the June sales tax return. The computation for claiming this credit should be made on forms prescribed by the department of revenue.

2. Energy Sales or use occurring on or after March 1, 2010 and before July 1, 2012.

The exemption of the sale, use, storage, or consumption of energy pursuant to §§39-26-102(21) and 715(2)(b), C.R.S. (2009), and as described in subsection 1, above, is suspended and such

sale, use, storage, or consumption is subject to sales and use tax if the sale, use, storage, or consumption occurs on or after March 1, 2010 and before July 1, 2012. See, Emergency Regulation 39-26-102(21). The suspension of this exemption does not apply to (1) diesel fuel for off-road use, (2) electricity, coal, gas, fuel oil, steam, coke, nuclear fuel used for agricultural, and (3) coal, gas, fuel oil, steam, coke, nuclear fuel used for generation of electricity, and (4) state-administered city, county, and special district sales taxes. Electricity, coal, wood, gas, fuel oil, or coke sold for residential use is exempt from sales and use tax regardless of whether such sale, use, storage, or consumption occurs before or after March 1, 2010. See, regulation 39-26-715.1(a)(II) for additional details.